

PRIVACY TIMES

COMMENTS ON FCC PROPOSALS FOR THE
TELEPHONE CONSUMER PROTECTION ACT
(CC DOCKET NO.92-90)

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MAY 26 1992

Federal Communications Commission
Office of the Secretary

Introduction

A fundamental problem with FCC's proposals for the TCPA is that they fail to appreciate the fact that some Americans know they no longer want to receive unsolicited phone calls, and consider any unsolicited call an unwarranted invasion of privacy. These Americans rightfully expect that the TCPA will maximize their ability to say "NO" to junk phone calls.

The FCC's proposals, however, are designed to maximize the circumstances under which unsolicited phone calls can be made. First, the FCC opposes creation of a feasible mechanism for individuals to notify telemarketers that they no longer want unsolicited calls. Second, the FCC seeks to expand loopholes that the telemarketing industry would exploit in order to continue business as usual.

Need For a "Do Not Call" National Database

Americans who know they no longer wish to receive unsolicited calls must have an effective way they can communicate their desire to the telemarketing world.

The system must also be enforceable. Realistically, this requires that the FCC respect Congress's intent and create a National "Do Not Call" Database.

Yet even before studying the issue adequately, or considering public comments, the FCC asserts, "In these times of fiscal restraint, the Commission does not believe that it is in the public interest to pass on to taxpayers the cost of a national database system."

The FCC's assertion about "cost" to the "taxpayers" is arbitrary, as the commission lacks an adequate record or evidence to support it. The commission is obligated to document the actual costs associated with a national database and then weigh those costs against the benefits of enhanced consumer privacy.

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In fulfilling its obligation to explore these important issues, the commission specifically should study contracting out to a "neutral" organization to operate the database. (By "neutral" I mean an organization that is not already a major trafficker in personal data, like the companies that contract with the U.S. Postal Service to exploit data from the National Change of Address system.) The contractor would set up a toll-free 800 number that individuals could call to get on the "Do Not Call" list. In addition, post cards could be made available in post offices that individuals could sign and send into the contractor. All telemarketers would then be required to check the list and refrain from calling any numbers on it. The contractor would charge the telemarketers a reasonable fee to recoup the public's investment. Advances in information technology would make operation of such a system relatively easy and affordable.

Moreover, it would clearly identify those Americans who do not want unsolicited phone calls, and any company that continued making calls to them would be liable. Clearly, this sort of system is faithful to Congress's intent.

The FCC offers other excuses for not supporting the database: "Consumer response to a national database may not be satisfied by what such a database would be able to deliver. For example, if a database were updated quarterly or semi-annually, consumers signing up for the database might continue to be called for 3 to 6 months before actually being entered onto the system."

An assumption that there must be a three to six month lag time before individuals' desire not to receive calls is noted by telemarketers is without foundation and therefore arbitrary. For instance, the USPS's National Change of Address system collects data from change-of-address cards and in 14 days, reports the data to its contractors. The contractors immediately use the data to compile "new movers lists," which are sold to marketers, usually without the individuals' knowledge or consent. If such information technology can be used to facilitate trafficking in personal data in 14-day cycles in a manner that reduces privacy, there is no reason it cannot be used to increase protection for privacy in a timely manner. At a minimum, the FCC should require that the national "Do Not Call Me" database be updated every 30 days.

Another FCC reason for opposing the database was: "In addition, even after the subscriber is on the database, consumers may continue to receive all calls exempted by the TCPA. For example, [they] would continue to receive calls from charitable institutions such as police benevolent associations, booster clubs, colleges and universities, state and local government election campaigns and pollsters."

According to the commission's reasoning, because the above categories are exempt under the TCPA, there should not be a

feasible mechanism enabling consumers to register their desires not to receive calls from commercial telemarketers. A more constructive approach is to proceed with the database, and then establish an FCC hotline for consumer complaints about the above-describe exempt categories. If these exempt categories generate sufficient complaints, then the commission should recommend legislative amendments to remove these exemptions.

The commission raised the important issue of "privacy concerns of consumers on a database list when such a list is maintained and accessible widely by private entities." Accordingly, the commission should recommend that Congress pass "bulletproof" protections for the data maintained by the contractor in the "Do Not Call" list. This would include a bar to governmental access to the information, much like Census data are protected by a specific law, and severe monetary penalties for unauthorized use of the data, particularly by those with authorized access to them.

The need for a national "Do Not Call" list becomes more apparent when considering the alternatives. In particular, the House Committee concluded that the Direct Marketing Association's "Telephone Preference Service" is not an effective or enforceable means for consumers to block unwanted calls. A central reason is that despite the DMA's efforts, only a fraction of the companies constituting the telemarketing world subscribe to the TPS. Moreover, the industry spends more time publicizing the TPS to lawmakers and regulators who are considering binding rules on telemarketers, than it does educating consumers about it.

The alternative of only requiring each company to maintain its own "Do Not Call" list would place an unwarranted burden on consumers to find every telemarketing firm and then notify each one separately of their desire not to be called.

If the commission nonetheless decides against protecting consumers' interests through establishment of a "Do Not Call" list then, at a minimum, it must require that the telemarketing industry respect the wishes of consumers who register with privately-held "Do Not Call" Lists.

Automated Dialers

An automated dialer represents a direct threat to those individuals who value their telephone numbers the most: the holders of unlisted or nonpublished phone numbers. Consumers pay extra for unlisted numbers so they can avoid commercial sales pitches intruding into their homes and maximize their control over who obtains their home phone number. Through sequential-number dialing, the auto dialer can simply call every number so that when the individual with the unlisted number answers his or her phone, the telemarketing firm knows it is a live number. Thus, the auto dialer is a device that deprives individuals of something they pay for and expect to enjoy, i.e. a private phone number.

Considering that the TCPA directs the commission to only exempt practices that "will not adversely affect the privacy rights that this section is intended to protect," it is vital that the commission only exempt auto dialers for emergency purposes or when the calling party has given his or her prior express consent.

Therefore, the commission should not establish exemptions for auto dialer use by "tax exempt nonprofit institutions," or for when the "called party has or had a voluntary business relationship with the caller" or for any other purpose. The commission's view that "the privacy rights the TCPA intends to protect are not adversely affected where the called party has or had a voluntary business with the caller" is an arbitrary one, because some customers, particularly those with unlisted phone numbers, consider the unsolicited call in and of itself an invasion of privacy.

"Voluntary Business Relationship"

The commission's proposal to permit continued telemarketing by businesses to customers with which they have a "prior voluntary relationship" would result in a huge loophole that would dramatically weaken consumers' privacy rights under the TCPA.

Any retail or grocery store, bank, utility, cable television firm, credit card company, etc. could "subcontract" with a telemarketing firm to call its customers for sales of any product, regardless of whether it had anything to do with the consumers' original relationship with the business.

For example, millions of Americans have a "voluntary" relationship with Publishers Clearinghouse. Under the commission's exemption, any telemarketing done by anyone to those millions of Americans would be legal -- as long as it was in the name of Publishers Clearinghouse.

If businesses have a relationship with a consumer, then they are in a position, either with an insert to a monthly billing statement or a separate mailing, to ask that consumer's permission before subjecting him or her to unsolicited calls.

Thus, rather than exempting the existing business relationship, the commission should require that businesses obtain from their customers their express written consent before subjecting them to telemarketing.

Debt Collection

The commission erroneously concludes that a debt collection call does "not adversely affect the privacy concerns the TCPA seeks to protect." Many Americans live in households in which their housemates, whether they be relatives, friends, new acquaintances, or landlords, are not privy to all details of their financial

lives. To authorize computerized debt collection calls when such calls would systematically result in the unauthorized disclosure of sensitive and confidential derogatory financial data would be a gross miscarriage of public policy -- particularly under a statute that was intended to strengthen privacy protection.

Conclusion

The Federal Communications Commission's proposals reflect a cramped interpretation of privacy which ignores Americans' demand for real protection against unwanted phone calls and which is inconsistent with the intent of the TCPA. Moreover, the proposals, which predominantly reflect preoccupation with preserving the commercial prerogatives of the telemarketing industry, represent a betrayal of its duty to Americans to act in the public interest. If the commission truly lacks the competence and expertise to analyze privacy interests, it has a duty to acquire such competence and expertise.

The real issue here is Choice. By establishing a national "Do Not Call" list and keeping exemptions narrow, the FCC can establish a system in which individuals can simply choose whether or not they want to continue receiving unsolicited commercial calls.

However, the FCC's current proposal of no national database and broad exemptions will strip Americans of many of the meaningful privacy protections that the TCPA intended. Accordingly, I urge the commission to come "180 degrees" and adopt responsible proposals that will Give Choice A Chance.